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Supreme Court, U.S.
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No. 93-18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

LELAND AND KARLA SWENSON,
Petitioners

v.

OGLALA SIOUX TRIBE,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE IDAHO SUPREME COURT

PETITIONER'S REPLY BRIEF

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QUESTION PRESENTED

Does the broad application of the Indian Child Welfare Act which Respondent advocates violate the Due Process Clause of the Constitution?

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PETITIONER'S REPLY BRIEF

I.

Respondent raises the issue of how Congress intended Indian tribes to benefit from the Indian Child Welfare Act but omits a necessary part of the discussion, which is, that the broad application of the Act which Respondent advocates violates the Due Process Clause of the Constitution.

If the Indian Child Welfare Act (ICWA) is constitutional, it is because it applies only to Indians who are members of federally recognized tribes. It was enacted as a means for tribes to assist tribal members to safeguard and preserve their parental rights. The ICWA was never intended to control custody decisions for children who are Indian by blood, but who are not tribal children. Courts and advocates have demonstrated a fundamental misunderstanding of the difference between "Indian" as a racial designation and "Indian" as a political identity. The application of the ICWA which Respondent advocates violates the Due Process Clause of the Constitution because it is racially based and is therefore invidiously discriminatory.

The ICWA recognizes the quasi-sovereign status of tribal governments. It provides a means for tribal courts to exercise their own judgment in determining the custody of tribal children and provides preference for placement within the tribe. Respondent claims that tribes have rights in the custody of a child even where the child has no substantive ties to a tribe, a reservation, or an Indian family. Respondent essentially takes the position that all that needs be present is a possible genetic connection to the Indian race. It asks this Court to sustain this impermissible application of the ICWA.

The child in this case was not claimed as eligible for membership by the Oglala Sioux Tribe at the time the custody proceedings took place. At no time did the tribe's witnesses represent that the child was eligible for membership in the tribe. The only evidence on this subject came from the Petitioners who submitted an affidavit from the tribal enrollment director who said the tribe did not then know if the child was eligible for membership or not. Although the tribe enrolled the child two years later without notifying or contacting the Idaho court or the parties to the custody proceedings, the child was not enrolled at the time of the proceedings, enrollment is not a matter of record in the trial proceedings, and could not have been considered by the trial court. The trial court could not lawfully apply the ICWA to this child's custody.

This Court has previously considered the question of whether federal statutes which make distinctions between Indians and non-Indians violate the Due Process Clause. The Court has concluded that such laws are constitutional if they are an expression of the federal trust responsibility. For example, the Court considered the constitutionality of the Indian Reorganization Act, 48 Stat. 986, 25 U.S.C. §472, which provides for Indian preference in hiring within the Bureau of Indian Affairs (BIA). Non-Indian employees of the BIA argued that the preference constituted invidious racial discrimination. This Court held that the preference was acceptable, reasoning as follows:

> "The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion."

See Morton v. Mancari, 417 U.S. 535, 554, 94 S.Ct. 2474, 41 L. Ed. 2d 290 (1974).

In a case which this Court decided in 1977, the question presented was whether federal criminal statutes violated the Due Process Clause of the Fifth Amendment by subjecting Indians to federal criminal prosecution. The Court held that the accused were subject to federal criminal jurisdiction because they were enrolled members of the tribe, not because they were of the Indian race.

> "The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal government's relations with Indians." *United States v. Antelope*, 430 U.S. 641, 645, 97 S.Ct. 1395, 51 L.Ed.2d 701 (1977) (Emphasis added.)

This Court has made it clear that federal Indian law is applicable to individual Indians on the basis that they are members of a tribe, not because they are Indian by race.

State court decisions applying the ICWA demonstrate a lack of understanding of the question of who is an Indian for purposes of federal law. The courts of New Jersey and California particularly misunderstood that the ICWA is an expression of the trust doctrine. These courts apply the ICWA to the custody of any child who appears to have Indian blood. *See Matter of Adoption of a Child of Indian Heritage,* 543 A.2d 925 (N.J. 1988); and, *In re Kahlen W.*, 285 Cal. Rptr. 507 (Cal. App. 5th Dist. 1991). This application of the ICWA is contrary to the above-cited decisions of this Court. The courts

of these states also ignore the policy and purpose of the ICWA and the express language of the statute, which precisely defines "Indian child" and "Indian child's tribe". 25 U.S.C. §1903(4) and (5). These definitions are critical because they limit the applicability of the ICWA.

The child in the instant case is reputedly the biological offspring of one Indian and one Caucasian parent. However, his custody is not to be placed in the hands of a tribe because of his racial composition. A tribe's right to assert jurisdiction or to determine placement is based on a showing that the child belongs to the tribe. Tribes may not interfere with the custody of children who are not tribal members or are not shown to be eligible to become tribal members at the time the adoption or termination proceedings take place.

In presenting its view of the case, Respondent misstates the facts as found at the trial of this matter. The trial court's findings of fact may be found in the Supplemental Appendix at pages nine through eleven. (9sa-11sa). The record confirms that the reputed biological father of Baby Boy Doe, Jeff Nothelphim, has demonstrated no interest in the child. Contrary to Respondent's representations that information was kept from him about the child's welfare and whereabouts, the record establishes that Jeff Nothelphim refused to respond to requests from his court-appointed counsel to communicate with his attorney about the child, even by telephone. (R. 159-169). The Oglala Sioux Tribe did not seek to preserve or protect Nothelphim's parental rights at the trial of the matter.

None of Respondent's arguments in support of the application of the ICWA to the facts of this case are germane because it was not established at trial that the child was eligible to become a tribal member. The trial court found that the tribe had not established this fact.

CONCLUSION

Respondent has not presented a basis for denying certiorari in this case. In fact, the arguments which Respondent advances serve to underscore the confusion which abounds among the states in interpreting this federal law.

The ICWA was meant to be a shield to prevent harm. The courts should not allow it to become a sword to cut off the rights of parents and children alike who have no substantive connection to an Indian tribe. The cases are clear that even the interests of tribes and their members often diverge.

How are the substantive provisions of the ICWA to be interpreted by the states? May a state court make a determination of eligibility for tribal membership in place of the tribe? What is a constitutionally permissible application of this law?

Petitioners pray that this Court will consider these issues and that the petition for a writ of certiorari be granted.

Respectfully submitted,

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